(5)

No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER AND STEVE LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as amicus curiae. The written consent of all the parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioner.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of

employment discrimination. Its membership includes over 280 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially, all of EEAC's members, and the constituents of its trade association members, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (Title VII) As such, EEAC's members have a direct interest in the issue presented for the Court's consideration. That is, where the plaintiff has established a prima facia case of illegal discrimination and the employer has articulated a legitimate nondiscriminatory reason for that treatment, is an employee's showing that an employer's articulated reason was mere "pretext" necessarily the legal equivalent of showing that it was "pretext for discrimination" as required by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)?

The court of appeals below held that once an employer's articulated nondiscriminatory reasons were found to be deficient, the plaintiff prevails "as a matter of law." This is contrary to case law and common sense. A number of nondiscriminatory reasons might account for an employer's deficient reasons.

In the case at bar, for example, the district court found that the employer's reasons were based upon personal considerations, not discriminatory intent. Thus, allowing the holding of the court of appeals to stand will undercut the rule of law established in *McDonnell Douglas* and *Burdine*.

Because of its interest in issues involving the standard of proof in Title VII cases, EEAC has filed briefs amicus curiae in numerous cases before this Court including *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Connecticut v. Teal*, 457 U.S. 440 (1982); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), and *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).

STATEMENT OF THE CASE

The plaintiff filed an individual Title VII suit against his employer, St. Mary's Honor Center, an adult correctional institution of the Missouri Department of Corrections, alleging he was demoted and then later terminated because of his race. Following a bench trial on the merits, the district court found the plaintiff had established that the defendant's reasons for demoting and terminating the plaintiff were pretextual. The district court stated, however, that the plaintiff had failed to establish that the defendant's reasons were a pretext for discrimination. Although the district court agreed there were questions regarding the employer's stated reasons, the district

court did not believe the employer's reasons were a pretext for racial discrimination.

The district court concluded that racial discrimination did not play a role in the plaintiff's firing for a number of reasons. First, the evidence showed that the new management concluded the institution was poorly run. They gave existing supervisors a probationary period to improve conditions, but the supervisors failed to make the anticipated improvements. As a result, some employees were fired. Because more supervisors were black, more blacks than whites were fired during the applicable time period. This did not alarm the district court because the court noted drastic measures were needed to improve the facility. The court further stated that thirteen additional blacks were hired in the time period in question, keeping the total number of blacks at the facility constant. Finally, the record showed that the disciplinary board that fired the plaintiff was comprised of two whites and two blacks. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991). Because there was no showing of "pretext for discrimination," the district court ordered judgment for the defendant.

The U.S. Court of Appeals for the Eighth Circuit reversed the district court, holding instead that the plaintiff satisfied his burden of proof in accordance with the standards set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) by showing that the defendant's nondiscriminatory reason proffered for the demotion and subsequent termination were merely pretextual. The court below did not require the plaintiff to demonstrate that the pretextual reasons were based on racial discrimination. Instead, the court of appeals made a blanket statement: once an employer's

reasons are discredited, the plaintiff's inquiry goes no further. *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492-493 (8th Cir. 1992). The court below held,

> [i]f the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action—then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required.

970 F.2d at 493. The court thus established an inflexible rule that "[o]nce plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." *Id.* at 492.

SUMMARY OF ARGUMENT

The court below ruled that a plaintiff in a disparate treatment suit prevails "as a matter of law" once an employer's articulated reasons for its actions are rebutted. This holding is erroneous because it violates the principles set forth in *McDonnell Douglas* and *Burdine* which require the plaintiff to demonstrate that the defendant's articulated nondiscriminatory reasons actually were based upon impermissible factors, such as the plaintiff's race or sex. The U.S. Court of Appeals for the Eighth Circuit is also in conflict with other circuits. *See also Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992) (A showing of pretext must be based on discriminatory intent); *Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities*, 810 F.2d 146 (7th Cir. 1987), *cert. denied*, 483 U.S. 1006 (1987) (A finding of pretext does not necessarily mean the employer acted

with discriminatory intent). In *EEOC v. Flasher Co.*, 60 Fair Empl. Prac. Cas. (BNA) 814, 820 (10th Cir. 1992), the correct rule of law recently has been clarified:

> Merely finding that people have been treated differently stops short of the crucial question: why people have been treated differently. While comparing specific disciplinary actions can give rise to an inference of discrimination, it need not do so. Proffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to liability under Title VII.

Thus, this Court and three other circuits have made it clear that an employer's articulated nondiscriminatory reason may be classified as pretextual only if it is a "pretext for [illegal] discrimination," not if it is merely pretext for some other nondiscriminatory intent. *Burdine*, 450 U.S. at 253. Moreover, the standard adopted by the Eighth Circuit undercuts the purpose of the *McDonnell Douglas* test by not requiring the plaintiff to show that the defendant's articulated nondiscriminatory reasons were "a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805.

ARGUMENT

I. TO ESTABLISH ILLEGAL DISCRIMINATION UNDER TITLE VII, THE PLAINTIFF MUST PROVE THAT THE EMPLOYER'S ARTICULATED NONDISCRIMINATORY REASONS FOR ITS ACTIONS WERE A "PRETEXT FOR DISCRIMINATION" AS REQUIRED BY *BURDINE*; CONTRARY TO THE EIGHTH CIRCUIT'S DECISION, MERELY REBUTTING THE EMPLOYER'S ARTICULATED REASONS DOES NOT ESTABLISH ILLEGAL DISCRIMINATION AS A MATTER OF LAW.

A. The Court Below Failed To Apply the Correct Rule of Law by Not Requiring the Plaintiff To Demonstrate That the Employer's Articulated Reasons Were a Pretext for Impermissible Discriminatory Factors Such as Race or Sex.

1. *The plaintiff must establish a prima facie case of illegal discrimination.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits discrimination in employment on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2. In a series of decisions beginning with *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and continuing through *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court has developed a series of requirements a plaintiff must fulfill in order to prove illegal disparate treatment. Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), so that direct, "smoking gun" evidence is often unavailable, this Court has instead developed "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of

discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

McDonnell Douglas set forth "the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." *Burdine*, 450 U.S. at 252. In the first prong of the analytical framework, the plaintiff establishes a prima facie case of racial discrimination. The plaintiff must prove by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802.

At this stage of the proof, the plaintiff's burden is not difficult: "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. The Court of Appeals for the Tenth Circuit agreed, "The presumption arising under the first prong of *McDonnell Douglas* is a relatively weak inference that corresponds to the small amount of proof necessary to create it." *Flasher*, 60 Fair Empl. Prac. Cas. at 818 (citation omitted).

2. The next step, the defendant's burden of going forward: merely articulating, but not proving, a legitimate nondiscriminatory reason for the disparate treatment.

Once the plaintiff has established its prima facie case, the burden of going forward is then on the defendant to "articulate a legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas*, 411 U.S. at 802. The employer need only "articulate" a nondiscriminatory reason.

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons (citation omitted). It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against plaintiff.

Burdine, 450 U.S. at 254-255.

The defendant is required to state the reasons for its actions because "[t]here is no limit to the potential number of reasons that could be raised at trial. Otherwise, litigation of discrimination claims would be needlessly confused and delayed." *Flasher*, 60 Fair Empl. Prac. Cas. at 818. The defendant's burden of articulation also is light. The employer is only required to state its reason, not prove that it used the stated reason or anything about the reason. As the *Flasher* court explained:

> The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does

not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

Id. at 817 (citations and footnote omitted).

3. ***After the defendant has articulated a legitimate nondiscriminatory reason, the plaintiff must then prove, by a preponderance of the evidence, that the defendant's reasons were pretextual and the actual reason for the disparate treatment was illegal discrimination.***

If the defendant articulates a nondiscriminatory reason for its actions, the inference of discrimination raised by the prima facie case "vanishes" (*Flasher*, 60 Fair Empl. Prac. Cas. at 821) and "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255. At that next level of inquiry, the court must determine that the plaintiff "was the victim of intentional discrimination." *Flasher*, 60 Fair Empl. Prac. Cas. at 821, n.11.

> [T]he plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext *for discrimination.*

Burdine, 450 U.S. at 253 (emphasis added). Also,

> [The plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup *for a racially discriminatory decision.*

McDonnell Douglas, 411 U.S. at 805 (emphasis added).

Thus, the plaintiff must be careful to demonstrate that the employer's articulated reason was a pretext *for discrimination*, and not merely pretext in the generic sense.

> It is easy to confuse 'pretext for discrimination' with 'pretext' in the more common sense (meaning any fabricated explanation for an action), and to confound even this watery use of 'pretext' with a mistake or irregularity.

Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 559 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987) (*see Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992)).

Thus, the rule of law is clear: the plaintiff must show that the defendant's articulated nondiscriminatory reasons were a pretext for discrimination of the specific type prohibited by the statute.

B. To Prevail in a Disparate Treatment Case, a Plaintiff Must Prove "Pretext for Discrimination," Not Merely "Pretext" in the Generic Sense.

An issue arises, therefore, when a plaintiff demonstrates that the articulated reason is pretext, but does not prove "as a matter of law" that the pretext is a sham for covering up discrimination based on a protected class status. It is clear that a plaintiff must do more than merely demonstrate that there was pretext, for that pretext may have arisen out of many sources. In short, a plaintiff must convince the trier of fact that there was "pretext for discrimination." *Burdine*, 450 U.S. at 253.

The purpose of the *McDonnell Douglas* test is to facilitate the central inquiry: did discrimination

occur? *Furnco*, 438 U.S. at 577. Contrary to the inflexible legalistic approach of the court below, "[t]he method suggested in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic." *Id.* Accordingly, the flexibility of the *McDonnell Douglas* proof scheme does not relieve the plaintiff from the ultimate burden of demonstrating some connection to discriminatory intent. The prima facie case raises the inference of discrimination, the defendant's legitimate, nondiscriminatory explanation for the difference in treatment makes the presumption from the prima facie case drop out, and the plaintiff must demonstrate that the defendant's reasons were a "pretext for discrimination." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983).

Thus, while discriminatory intent may be manifest in the course of proving pretext, if the showing of pretext is not based on sufficient evidentiary proof of discriminatory intent, the burden on the plaintiff to demonstrate such intent to a preponderance of the evidence was not met.

1. *A plaintiff's showing of differences in treatment of members of a protected class does not necessarily establish intentional discrimination.*

The court below was incorrect in holding that the plaintiff's showing that similarly situated individuals were treated differently required a ruling for the plaintiff "as a matter of law." A contrary, but correct approach is set out in *EEOC v. Flasher Co.*, 60 Fair Empl. Prac. Cas. 814 (10th Cir. 1992). The plaintiff brought a Title VII claim based on national origin. The plaintiff, an Hispanic employee, established that the defendant had disciplined him differently from the other non-minority employees at the company. The plaintiff did not, however, establish that this treatment was related to racial discrimination. The court stated: "[w]e hold that a mere finding of disparate treatment, without a finding that the disparate treatment was the result of intentional discrimination based upon protected class characteristics, does not prove a claim under Title VII." *Id.* at 815.

The *Flasher* decision explains that an employer's reason for treating an employee differently, though not based on a rational business practice, does not necessarily compel the conclusion that the disparate treatment was discriminatorily motivated.

> It is error to assume . . . that differential treatment between a minority employee and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy *must* be based on illegal discrimination because of an employee's protected class characteristics. Such an assumption is neither correct under the law nor is it an accurate reflection of reality.
>
> * * * *
>
> Title VII does *not* make unexplained differences in treatment per se illegal nor does it make inconsistent or irrational employment practices illegal. It prohibits only intentional discrimination *based upon* an employee's protected class characteristics.

Id. at 819 (citations omitted).

All of this Court's prior decisions require that the trier of fact must ultimately believe that the differences in treatment were related to discrimination and not some other reason not prohibited by the stat-

ute. The trier of fact, for instance, may also believe that human nature caused the employer to implement irrational employment practices which led to the disparate treatment, rather than illegal discrimination. No business is immune from disparate treatment that is based on reasons not prohibited by law: "Differences in treatment are inevitable, and even irrational or accidental differences of treatment occur in most business organizations of any size." *Id.* The Tenth Circuit further explained:

> Human relationships are inherently complex. Large employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods and an incredible array of facts that will inevitably differ even among seemingly similar situations. The law does not require, nor could it ever realistically require, employers to treat all of their employees all of the time in all matters with absolute, antiseptic, hindsight equality.

Id.

The *Flasher* court also identified other situations where an employer treated its employees differently, but that treatment was not prohibited under Title VII:

> Sometimes apparently irrational differences in treatment between different employees that cannot be explained on the basis of clearly articulated company policies may be explained by the fact that the discipline was administered by different supervisors, *Jones v. Gerwens*, 874 F.2d 1534, 1541 (11th Cir. 1989), or that the events occurred at different times when the company's attitudes toward certain infractions were different, *Grohs v. Gold Bond. Bldg. Products*, 859 F.2d 1283, 1287 (7th Cir. 1988), *cert. denied*, 490 U.S. 1036 (1989), or that the individualized circumstances surrounding the infractions offered some mitigation for the infractions less severely punished, *Brazer v. St. Regis Paper Co.*, 498 F. Supp. 1092, 1098 (M.D. Fla., 1980). . . .

60 Fair Empl. Prac. Cas. at 820 (footnotes omitted).

In the above mentioned cases, the plaintiff did not establish that the employer's articulated nondiscriminatory reason was pretextual. The plaintiff merely established that the employer was treating employees differently, not that they were treated differently on the basis of illegal intent.

2. A showing of pretext alone does not satisfy the plaintiff's burden of proving "pretext for discrimination" by a preponderance of the evidence.

In the next scenario—the situation in the instant case—plaintiff may have demonstrated that the employer's articulated reason was not the true reason for the disparate treatment. The plaintiff, however, did not prove by a preponderance of the evidence (either by direct evidence or inference) that the employer's pretextual explanation for the disparate treatment was given to cover up an illegal intent to discriminate. In those instances, the court should not find "pretext for discrimination." *Burdine*, 450 U.S. at 253.

In *Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities*, 810 F.2d 146 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987), the plaintiff did not prevail even after a finding of pretext because the employer's underlying action was not proven by a preponderance of the evidence to be based on illegal intent to discriminate.

> [T]he plaintiff must show that intentional discrimination caused the employer to take some unfavorable action [citations omitted]. . . . To have any hope of showing this, the plaintiff must puncture a neutral explanation the employer offers for its conduct. Benzies argues that if the plaintiff does so—in the argot, shows that the explanation is a "pretext"—then the district court must infer that the employer acted with discriminatory intent. Not so. A demonstration that the employer has offered a spurious explanation is strong evidence of discriminatory intent, *but it does not compel such an inference as a matter of law.*

Id. at 148 (emphasis added).

Similarly, in *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992), the plaintiff also established that the defendant's articulated nondiscriminatory reasons for her termination were pretextual. The court, however, ruled that the plaintiff failed to prove a pretext for discrimination.

> It is apparent to us . . . that Galbraith's [the plaintiff] asserted violation of the company's medical leave policy was a pretext for the company's true motives in discharging Galbraith.
>
> * * * *
>
> The 'legitimate' reason proffered by Northern Telecom is clearly a pretext, and although it is 'unworthy of belief,' we do not believe that it is a pretext for racial discrimination.

Galbraith, 944 F.2d at 282.

In *Galbraith* the court's rationale provides ample reasoning to reject the holding of the Eighth Circuit below:

> In this case, the magistrate apparently believed that once Galbraith had demonstrated that abuse of the medical leave system was not the reason for her dismissal, *no further inquiry was required* and Galbraith was entitled to judgment, even if there was little other evidence of racial motivation. *This view misapprehends* the nature of the *McDonnell Douglas* doctrine. . . . In the third phase of the *McDonnell Douglas* framework, she must persuade the trier of fact that the proffered reason was pretextual, but this burden is simply a way of bearing her ultimate burden of showing that she has been the victim of intentional discrimination.

Galbraith, 944 F.2d at 282-283 (emphasis added).

Thus, it is entirely possible that a plaintiff can demonstrate "pretext" but fail to demonstrate "a pretext for discrimination." As the court stated in *Flasher*,

> [D]ifferences in treatment are inevitable . . . Although differential treatment not premised on rational business policy may in some instances support an inference of illegal discriminatory intent, such a conclusion is *not compelled as a matter of law.*

60 Fair Empl. Prac. Cas. at 819 (emphasis added).

3. *"Pretext for discrimination" was not proven by a preponderance of the evidence in the instant case.*

In the instant case, the plaintiff established that the defendant's articulated reasons for the disparate treatment were pretextual. The district court, however, found that the reasons were not a pretext for discrimination.

The district court below found that the plaintiff had not proven that the employer's conduct "was racially rather than personally motivated." *Hicks*, 756 F. Supp. at 1252. Indeed, the district court found that plaintiff's black subordinates who actually committed the violations that lead to plaintiff's discharge "were not disciplined in any way." *Id.*

Further, the plaintiff did not present any statistical evidence showing "a general pattern of discrimination against blacks." *McDonnell Douglas v. Green*, 411 U.S. at 805. To the contrary, the district court held that although about twelve blacks and one white employee were terminated during the relevant time period, the employer *hired* thirteen blacks during the same period. 756 F. Supp. at 1242. Also, "the number of black employees at St. Mary's remained constant during the period in question." *Id.* Further, "the disciplinary review board which recommended this discipline was composed of two blacks and two whites." *Id.* Based on this evidence, the district court concluded that the plaintiff had not, "proven by direct evidence or inference that his unfair treatment was motivated by his race." *Id.* These findings were not considered or rejected by the Eighth Circuit which apparently felt they were irrelevant because the employer's stated reasons were not credited.

This evidence, indeed, would not be relevant under the applicable law set out by the Eighth Circuit below:

> In this circuit, if the plaintiff has met his or her burden of proof at the pretext stage—that is, if the plaintiff has proven by a preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action—then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required.

Hicks, 970 F.2d at 493.

Contrary to the Eighth Circuit's faulty rationale, the plaintiff must be required to prove that the pretextual reason was a coverup for *illegal, intentional* discrimination. As the evidence shows, the plaintiff failed "to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. Instead, competent evidence considered by the district court show the contrary—that permissible reasons explained the employer's actions.

Thus, both *McDonnell Douglas* and *Burdine* require the plaintiff to show the court that the pretextual reason was based on an intent to illegally discriminate. In the case at bar, the court below failed to require the plaintiff to show that the pretextual reason was motivated by illegal discrimination.

CONCLUSION

The decision of the court below is inconsistent with the standards for pretext established by this Court. The courts of appeals for three circuits have upheld this Court's rule of law regarding pretext. Moreover, to permit a plaintiff to establish pretext without requiring the plaintiff to relate that to illegal discrimination, is not in keeping with its purpose of establishing an inference of discrimination. Finally, such a standard undercuts the purpose of the third step of the *McDonnell Douglas* test requiring a showing that the defendant's articulated nondiscriminatory reasons

were "a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805.

For the reasons stated, EEAC respectfully submits that the decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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